Supreme Court, U.S.
FILED
NOV 1
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-615 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's conviction must be reversed because a magistrate presided over the jury selection at petitioner's trial, even though petitioner consented to the magistrate's role.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Adams v. *United States ex rel. McCann*, 317 U.S. 236 (1942)	4
Barker v. *Wingo*, 407 U.S. 514 (1972)	4
Billini v. *United States*, 110 S. Ct. 2186 (1990)	5
Garner v. *United States*, 424 U.S. 648 (1976)	4
Gomez v. *United States*, 109 S. Ct. 2237 (1989)	3
Jones v. *Barnes*, 463 U.S. 745 (1983)	4
Popal v. *United States*, cert. denied, 110 S. Ct. 1111 (1990)	5
Reed v. *Ross*, 468 U.S. 1 (1984)	4
United States v. *Cronic*, 466 U.S. 648 (1984)	4
United States v. *Lake*, 910 F.2d 414 (7th Cir. 1990)	4
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1940)	3, 4, 5
United States v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990)	3
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	4

Statutes:

21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
21 U.S.C. 952	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-615

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 904 F.2d 34 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on October 10, 1990, and is therefore one day out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, peti-

tioner was convicted of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846; possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and importation of heroin, in violation of 21 U.S.C. 952. He was sentenced to 135 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. The evidence at trial showed that petitioner participated in the importation of four kilograms of heroin from Thailand to the United States on July 12, 1988. Specifically, petitioner went to J.F. Kennedy International Airport in New York to pick up the courier of the drugs. When he was arrested, he was carrying a key to one of the suitcases in which the heroin was found. The evidence also suggested that petitioner had been in Thailand when the drugs were purchased and that he had followed the heroin back to New York. Gov't C.A. Br. 3-9.

At a pretrial conference on October 14, 1988, the district court asked petitioner whether he had any objection to holding jury selection before a magistrate. Petitioner's counsel, in petitioner's presence, replied that he "would love the opportunity." Gov't C.A. Br. 3. On December 2, 1988, the magistrate to whom jury selection had been assigned again inquired in petitioner's presence whether petitioner wished to consent to have the magistrate preside over jury selection. Petitioner's counsel again gave his express consent. Petitioner did not later object in the district court to the magistrate's role in jury selection or to any specific ruling by the magistrate during jury selection. *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-4a. It rejected (*id.* at 2a) petitioner's claim that reversal of his conviction was required by this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), which held that the Federal Magistrates Act did not authorize district courts to delegate jury selection in felony trials to magistrates and that the supervision of jury selection by a magistrate was not subject to harmless error analysis. In rejecting petitioner's *Gomez* claim, the court of appeals relied on its prior decisions in *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (1989), cert. denied, 110 S. Ct. 1140 (1990), and *United States* v. *Musacchia*, 900 F.2d 493 (1990). In *Mang Sun Wong*, the court held that a defendant's explicit consent to a magistrate's supervision of jury selection waives any subsequent challenge on that ground. In *Musacchia*, the court rejected the argument that an objection to the magistrate's presiding over jury selection would have been futile.

ARGUMENT

Petitioner contends (Pet. 6-7) that this Court's decision in *Gomez* requires reversal of his conviction even though his counsel expressly consented to jury selection by a magistrate. Petitioner also asks this Court to hold his petition and dispose of it in light of the decision in *United States* v. *France*, No. 89-1363.

1. In *Gomez*, the Court framed the issue before it as "whether presiding at the selection of a jury in a felony trial *without the defendant's consent*" is among the duties that the Magistrates Act empowers magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when "*despite the defendant's objection* and without any

meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, the precise holding of *Gomez* extends only to cases in which the district court delegated jury selection to a magistrate over the defendant's objection. As the courts of appeals found in *United States* v. *Lake*, 910 F.2d 414, 417 (7th Cir. 1990), and *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990), *Gomez* does not require reversal of a conviction where the defendant consented to the magistrate's conducting voir dire.*

This is true even though it was petitioner's counsel —not petitioner himself—who agreed to have a magistrate conduct voir dire. In general, a criminal defendant "is bound by the * * * decisions of [his] counsel." *Reed* v. *Ross*, 468 U.S. 1, 13 (1984). See also *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs"). The defendant's personal consent is needed for only a few "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (Burger, C.J.,

* No court has found to the contrary. Moreover, that conclusion is consistent with this Court's many decisions holding that a defendant may waive important rights. For example, the Court has held that a defendant may waive the right to be free from compulsory self-incrimination, see *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976), the right to counsel, see *Adams* v. *United States ex rel. McCann*, 317 U.S. 236, 275 (1942), and the right to a speedy trial, see *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972). The statutory right to have a district court preside at jury selection enjoys no special status that would preclude its waiver.

concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury [trial], or testify in one's own behalf are ultimately for the accused to make"). The decision whether to consent to the magistrate's conducting jury selection is not one of those basic decisions that cannot be made by counsel on the defendant's behalf.

2. There is no need to hold this case pending the outcome of *France*. The defendant in *France* did not consent to a magistrate's presiding over jury selection, but simply failed to object to that procedure. *France* raises the question whether a defendant's failure to object to a magistrate's supervision of jury selection may be excused on the ground that an objection would have been futile in light of controlling court of appeals decisions approving the delegation of jury selection to magistrates. That issue is not present in this case, however, because petitioner enthusiastically consented to the magistrate's role in jury selection. Thus, petitioner cannot claim that he preferred to have the district court conduct jury selection, but failed to object to the magistrate's supervision of jury selection because he regarded such an objection as futile. This Court recently has denied review in several cases that raised the same issue that petitioner seeks to raise here. See *Popal* v. *United States*, cert. denied, 110 S. Ct. 1111 (1990); *Mang Sun Wong* v. *United States*, cert. denied, 110 S. Ct. 1140 (1990); *Billini* v. *United States*, cert. denied, 110 S. Ct. 2186 (1990). In each of those cases, the defendant consented to a magistrate's supervision of jury selection, and this Court denied review of the defendant's claim that the affirmative consent did not result in a waiver of the *Gomez* claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20174